

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KENNETH E. DEVORE

Claimant

VS.

RUAN TRANSPORT CORPORATION

Respondent

AND

PLANET INSURANCE COMPANY

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 198,468

ORDER

Claimant appeals from the April 15, 1998 Award of then Assistant Director Brad E. Avery. Oral argument was held November 23, 1998.

APPEARANCES

Claimant appeared by his attorney, Carlton W. Kennard of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Edward D. Heath, Jr., of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Edwin H. Bideau, III, of Chanute, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as set forth in the Award of the Assistant Director are herein adopted by the Appeals Board.

ISSUES

What is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After considering the entire record, the Appeals Board makes the following findings of fact and conclusions of law.

The Appeals Board finds that the Award of the Assistant Director sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those.

The findings and conclusions enumerated in the Award of the Assistant Director are accurate and appropriate, and the Appeals Board adopts same as its own findings and conclusions as if specifically stated herein.

The Assistant Director found claimant to have suffered a 7.5 percent functional impairment to the back based upon the testimony and evidence of Edward J. Prostic, M.D. As Dr. Prostic's opinion regarding claimant's functional impairment to the back is uncontradicted, the Appeals Board adopts same as its own finding.

A dispute arose regarding what, if any, psychological involvement claimant's injury may have had. Three medical experts were involved in this litigation. Two of the experts, Stanley V. Butts, Ph.D., a psychologist, and Lee T. Weng, M.D., a psychiatrist, testified. The January 25, 1996 report of G. R. Wurster, M.D., was included but Dr. Wurster's testimony was not taken. In reviewing the opinions of three experts, the Assistant Director found the opinion of Dr. Weng to be the most credible. The Appeals Board agrees. Dr. Butts examined claimant in 1994 and did not have the opportunity to observe claimant more recently. Dr. Butts' impairment rating of 70 percent to the body appeared inflated when considering the videotape placed into evidence. Dr. Butts' impairment rating would indicate a moderately severe impairment, whereas the activities by claimant on the videotape did not.

In addition, the report of Dr. Wurster found claimant to be substantially impaired. However, at the time claimant was being examined by Dr. Wurster in January, 1996, claimant was involved in a business opportunity which required him to be directly involved in the design and development of a self-storage unit. This necessitated that claimant be involved in the creation of the financing for this unit. A review of Dr. Wurster's report fails to indicate any knowledge on Dr. Wurster's part of claimant's involvement in this business venture. In fact, Dr. Wurster's report describes a claimant who is substantially limited in his ability to perform any type of work but instead spends his time in an easy chair sitting and thinking himself into a bad mood.

Dr. Weng, on the other hand, had the opportunity to examine claimant on two occasions, on April 1, 1997, and on May 13, 1997. He acknowledged claimant indicated a limitation of his motivational level due to pain and the claimant described himself as being in a depressed state of mind. He was, however, aware of claimant's involvement in

the building of the 32-unit storage business as well as his involvement with numerous rental properties claimant owns.

Dr. Weng opined that claimant would not have been able to supervise the construction of the storage business had he been as severely impaired as was indicated by both Dr. Wurster and Dr. Butts.

The Appeals Board, therefore, finds that the opinion of Dr. Weng is the most credible regarding what, if any, impairment claimant may have suffered from his psychological injury. The award of the Assistant Director limiting claimant to a 10 percent functional impairment for the psychological injury, making a total award of 17.5 percent to the body as a whole, should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Assistant Director Brad E. Avery, dated April 15, 1998, should be, and is hereby affirmed.

IT IS SO ORDERED.

Dated this ____ day of December 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Carlton W. Kennard, Pittsburg, KS
Edward D. Heath, Jr., Wichita, KS
Edwin H. Bideau, III, Chanute, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director